

October 17, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Public Utility District No. 1

Date of Filing: September 13, 2005

Case Number: TFA-0119

On September 13, 2005, Public Utility District No. 1 of Snohomish County, Washington (the Appellant) filed an Appeal from a final determination that the Bonneville Power Administration (BPA) of the Department of Energy (DOE) issued on August 9, 2005. In the determination, BPA partially denied the Appellant's request for information submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require BPA to release the information it withheld and grant a fee waiver to the Appellant.

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

I. BACKGROUND

In a letter dated November 16, 2004, the Appellant submitted a FOIA request to BPA for documents including "[a]ll comments received by BPA relating to the 2004 Transmission - Policy Level Environmental Impact Statement (EIS); and . . . [a]ll internal communications, whether written or electronic, relating to BPA's decision to suspend work on the 2004 Transmission - Policy Level EIS." Request Letter dated November 16, 2004, from Michael A. Goldfarb, Attorney for Appellant, to Ms Annie Eissler, BPA. On June 1, 2005, BPA responded, stating that it was enclosing all documents in their entirety responsive to the request. Determination Letter dated June 1, 2005, from Annie Eissler to Michael A. Goldfarb.

On July 6, 2005, the Appellant filed an Appeal of the June 1, 2005 Determination with the Office of Hearings and Appeals (OHA) of the DOE. Shortly thereafter on August 9, 2005, BPA withdrew its June 1, 2005 Determination and issued a new determination. Determination Letter dated August 9, 2005, from Annie Eissler to Michael A. Goldfarb. In that Determination, BPA enclosed all documents that it had identified as responsive to the first part of the Appellant's request. It also released all documents responsive to the second part of the Appellant's request, but these documents were heavily redacted. BPA relied on Exemption 5 of the FOIA to make these redactions. August 9, 2005 Determination Letter at 1.

In its Appeal, the Appellant disputes the withholding of information under Exemption 5. First, the Appellant argues that because BPA disclosed some of its internal communications relating to its decision to terminate the EIS, it has waived the privilege as to any additional similar communications. Appeal Letter dated September 12, 2005, from Michael Goldfarb to Director, OHA, at 2. Second, the Appellant argues that both it and the public have a right to any information pertaining to BPA's decision not to perform an environmental assessment. *Id.* at 2. The Appellant then goes on to argue that it wishes to challenge BPA's fee estimate as excessive. Further, because it is a municipal corporation, it claims the fees should be reduced. *Id.* at 3.

II. ANALYSIS

Deliberative Process and Predecisional Documents

Exemption 5 of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). The language of Exemption 5 has been construed to "exempt those documents, and only those documents, normally privileged in a civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). Included within the scope of Exemption 5 is the "predecisional" privilege, sometimes referred to as the "executive" or "deliberative process" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The predecisional privilege permits the agency to withhold records that reflect advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *Sears*, 421 U.S. at 150. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973) (*Mink*); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

In order to be shielded by Exemption 5, a record must be both predecisional, *i.e.*, generated before the adoption of agency policy, and deliberative, *i.e.*, reflecting the give-and-take of the consultative process. *Coastal States*, 617 F.2d at 866. The predecisional privilege of Exemption 5 covers records that typically reflect the personal opinion of the writer rather

than the final policy of the agency. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

In addition, the FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Thus, if a document contains both predecisional matter and factual matter that is not otherwise exempt from release, the factual matter must be segregated and released to the requester.

There are, however, exceptions to these general rules that factual information should be released. The first exception is for records in which factual information was selected from a larger collection of facts as part of the agency's deliberative process, and the release of either the collection of facts or the selected facts would reveal that deliberative process. *Montrose v. Train*, 491 F.2d 63 (D.C. Cir. 1974); *Dudman Communications. Corp. v. Department of Air Force*, 815 F.2d 1565 (D.C. Cir. 1987). The second exception is for factual information that is so inextricably intertwined with deliberative material that its exposure would reveal the agency's deliberative process. *Wolfe v. HHS*, 839 F.2d 769, 774-76 (D.C. Cir. 1988). Factual matter that does not fall within either of these two categories does not generally qualify for protection under Exemption 5.

BPA has provided to the OHA copies of the documents that it released to the Appellant in redacted form. We have reviewed these documents and believe that they were properly redacted under Exemption 5. We have determined that BPA released the factual portions of these documents to the Appellant. The Appellant's first argument is that because BPA released a portion of its internal communications, all similar communications should be released. This argument does not apply to the facts in this case. In *Smith v. Alyeska Pipeline Serv.*, 538 F. Supp. 977 (D.C. Del. 1982), the court stated that “if a client chooses to disclose some privileged communications between the attorney and himself, then he waives the remainder of the communications which related to the *same subject matter*.” *Id.* at 979 (emphasis added). We have reviewed the information that BPA redacted and it does not relate to the same subject matter as the information that BPA released in its discretion; that is, it does not discuss BPA's decision to suspend work on the 2004 Transmission Policy EIS.

The Appellant's second argument is that it and its customers have a right to any information pertaining to BPA's decision not to perform an environmental assessment. Essentially, the Appellant is arguing that discretionary release would be in the public interest. Appeal Letter at 2. We disagree. The fact that material requested falls within a statutory exemption does not necessarily preclude release of the material to the requester. The DOE regulations implementing the FOIA provide that “[t]o the extent permitted by other laws, the DOE will make records available which it is authorized to withhold under 5 U.S.C. § 552 whenever it determines that such disclosure is in the public interest.” 10 C.F.R. § 1004.1. In this case, no public interest would be served by release of the comments and opinions contained in the documents, which contain deliberative material. The release of

this deliberative material could have a chilling effect upon the agency. The ability and willingness of DOE employees to make honest and open recommendations concerning similar matters in the future could well be compromised. If DOE employees were inhibited in providing information and recommendations, the agency would be deprived of the benefit of their open and candid opinions. This would stifle the free exchange of ideas and opinions which is essential to the sound functioning of DOE programs. *Public Utility District No. 1*, 28 DOE ¶ 80,241 (2002); *Fulbright & Jaworski*, 15 DOE ¶ 80,122 at 80,560 (1987).

Fees

In its Appeal, the Appellant challenges BPA's fee estimate as excessive. In addition, the Appellant claims that because it is a municipal corporation and is a not-for-profit, publicly owned utility, its request is not for a use or purpose that furthers a commercial, trade, or profit interest. Therefore, it argues that its request is not for commercial use and BPA's fees must be limited to "reasonable standard charges for document search and duplication" but not for document review. 5 U.S.C. § 552 (a)(4)(A)(ii)(III); 10 C.F.R. § 1004.9(b)(4). We contacted BPA to determine whether the Appellant had raised this issue before it. We were informed that it had not. Therefore, we will remand this part of the Appeal to BPA, so BPA can consider the Appellant's request.

III. CONCLUSION

BPA properly withheld the redacted material under the Exemption 5 deliberative process privilege. Therefore, this part of the Appeal will be denied. We will remand the matter to BPA so that it can consider the Appellant's claim that its request is not for commercial use, and therefore, fees must be limited to standard charges for document search and duplication.

It Is Therefore Ordered That:

- (1) The Appeal filed by Public Utility District No. 1 on September 13, 2005, Case No. TFA-0119, is hereby denied in part and granted in part as set forth in Paragraph (2) below.
- (2) This matter is hereby remanded to the Bonneville Power Administration which shall issue a new determination in accordance with the instructions set forth in the above Decision.

(3) This is a final Order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provision of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district where the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 17, 2005

